



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Ingenieria Y Construcciones Omega S.A.

File: B-241043

Date: December 28, 1990

Maria E.G. Revilla, Esq., Gonzalez Revilla y Asociados, for the protester.
Carlos A. De Obaldia, Esq., for Concrete and Asphalt, Inc., an interested party.
Robert W. Adams, Panama Canal Commission, for the agency.
M. Penny Ahearn, Esq., and John M. Melody, Esq., GAO, participated in the preparation of the decision.

DIGEST

Protest that agency's nonresponsibility determination lacked a reasonable basis is denied where determination was based on contracting officer's reasonable conclusion that the protester, who previously had experienced performance problems, did not provide proof that it had the necessary technical skills to perform the requirement.

DECISION

Ingenieria Y Construcciones Omega S.A. protests its rejection as nonresponsible and the award of a contract to Concrete and Asphalt, Inc., under invitation for bids (IFB) No. CC-90-71, issued by the Panama Canal Commission for the construction of new range towers for the Pacific entrance of the Panama Canal. Omega, the low bidder, contends that the nonresponsibility determination was unwarranted.

We deny the protest.

The work required by the solicitation included the furnishing of all material, labor, transportation, and engineering to completely design and erect three prefabricated range towers, foundations, and all other appurtenant work. The towers are navigational aids for piloting of vessels through the canal. At the June 26, 1990 bid opening, Omega was the low bidder.

In reviewing Omega's responsibility here, the Commission, aware that Omega had experienced performance problems under a February 1989 contract, conducted a preaward survey of the firm. Notwithstanding Omega's past performance problems, the

survey recommended award, citing improved performance on more recent contracts. The responsibility review also included a direct request to the firm for information showing that it had the technical capability to perform and that it met the other responsibility standards set forth in Federal Acquisition Regulation (FAR) § 9.104-1. Omega responded with financial, subcontractor, licensing and other information. The contracting officer determined, however, that Omega had not furnished information sufficient to establish that the firm had the technical capability to develop foundation designs or evidence that the firm could obtain such capability, a critical element for the proper erection and alignment of the navigational aid towers. More specifically, the contracting officer noted that the foundation design subcontractor specified by Omega, Fundaciones, S.A., had experienced performance problems on two recent contracts. Characterizing its resultant nonresponsibility determination as based on Omega's failure to submit evidence of technical capability, the Commission subsequently made award to Concrete and Asphalt, Inc. as the low responsive, responsible bidder.

Omega argues that the agency should have more clearly indicated what technical capability information it desired, and should have discussed the matter with the firm if the information furnished was deemed inadequate. In any case, Omega takes issue with the Commission's determination regarding its subcontractor's acceptability; it notes that, while cure notices were issued to Fundaciones under two recent contracts, default notices were never issued, and the problems encountered were beyond the subcontractor firm's control and currently are the subject of a claim. Omega concludes that the agency should not have relied on its subcontractor's performance problems in its nonresponsibility determination.

Before awarding a contract, a contracting officer must make an affirmative determination that the prospective contractor is responsible. FAR § 9.103(b). Among the general standards for responsibility are the requirements that a prospective contractor have a satisfactory performance record and the necessary technical skills or the ability to obtain them. FAR § 9.104-1(c) and (e). Subcontractor responsibility is one of the factors that may be used to determine a prime contractor's responsibility. FAR § 9.104-4(a). The determination of a prospective contractor's responsibility rests principally within the broad discretion of the contracting officer, and we therefore will not disturb a nonresponsibility determination absent a showing of either bad faith on the agency's part or that the determination lacked a reasonable basis. Garten-und Landschaftsbau GmbH Frank Mohr, B-237276; B-237277, Feb. 13, 1990, 90-1 CPD ¶ 186.

Omega does not allege bad faith and we find the agency's determination of nonresponsibility reasonable. The cure notices sent to Fundaciones indicate failure to use adequate or sufficient equipment for excavation purposes on one contract and lack of progress--between 38 to 100 percent behind schedule--on another contract. This information on its face was a sufficient basis for the Commission to consider Fundacione's prior performance deficient. The fact that the subcontractor apparently had not received default notices under the prior contracts did not preclude the agency from relying on this performance information in determining Omega's responsibility; a nonresponsibility determination may be based upon the contracting agency's reasonable perception of inadequate prior performance even where the agency did not terminate the prior contract for default and the contractor disputes the agency's interpretation of the facts or has appealed a contracting officer's adverse determination. Applied Power Technology Co. and Contract Servs. Co., Inc.--A Joint Venture, B-227888, Oct. 20, 1987, 87-2 CPD ¶ 376, aff'd, B-227888.2, Mar. 10, 1988, 88-1 CPD ¶ 247.

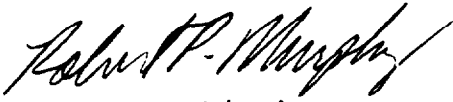
As indicated above, it was proper for the Commission to consider subcontractor responsibility in determining Omega's responsibility. FAR § 9.104-4(a). In light of the undisputed critical importance of foundation design to the satisfactory completion of the contract, we think the subcontractor's prior performance problems, together with the absence of any other information from Omega showing it otherwise had the technical capability to perform this portion of the contract, provided a sufficient basis for the agency's nonresponsibility determination.

Although the Commission did not specify precisely what types of information it required to determine Omega's technical capability to perform this contract, its request for technical capability information was sufficient to permit Omega to respond with relevant information, including that relating to its proposed foundation subcontractor. Although Omega would have preferred an opportunity to discuss responsibility considerations with the agency before being rejected, there was no requirement that the agency engage in such discussions before proceeding with the award. Theodor Arndt GmbH & Co., B-237180, Jan. 17, 1990, 90-1 CPD ¶ 64.

Omega complains that the contracting officer improperly failed to rely on the recommendation of award made by the preaward survey official. A contracting officer is not required to rely on the results of preaward surveys in making responsibility determinations. BMV, Div. of Harsco Corp., B-233081; B-233081.2, Jan. 24, 1989, 89-1 CPD ¶ 67. Here, the survey official based his award recommendation on Omega's acceptable performance of current contracts, while the

contracting officer looked more closely at the firm's technical capability to perform this contract, including the past performance of Omega's intended subcontractor. The contracting officer also considered it relevant that Omega's current contracts cited as the basis for the survey's recommendation did not require capability in foundation design and other technical areas involved in this contract. Under these circumstances, it was reasonable for the contracting officer to disregard the survey recommendation.1/

The protest is denied.


for James F. Hinchman
General Counsel

1/ Omega believes the Commission really based its nonresponsibility determination on the firm's problems under its 1989 contract, but the record simply does not support this speculation.